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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of Sections of the)
Cable Television Consumer) MM Docket No. 92-266
Protection and Competition)
Act of 1992:)
Rate Regulation)
)
Leased Commercial Access) CS Docket No. 96-60

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REPLY COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom"), by its attorneys, hereby submits its reply to comments filed in the above-referenced proceeding.¹ As will be demonstrated more fully below, the record in this proceeding overwhelmingly supports that (i) given the potential harm to existing programmers and the current level of diversity in the programming marketplace, there is no need for any changes in the leased access rules; (ii) in any event, the Commission should not proceed without taking due account of the public interest effects that the proposed changes to the leased access rules would produce by forcing displacement of existing programmers to accommodate leased access programmers; and (iii) if the Commission nevertheless determines that some changes to the existing leased access rules are necessary, these changes should be implemented in a manner that mitigates the harm to existing

¹ In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation, Leased Commercial Access, MM Docket No. 92-266 and CS Docket No. 96-60, FCC 96-122 (rel. Mar. 29, 1996).

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programmers and the viewing public to the maximum extent possible.

I. The Record Demonstrates that the Proposed Changes to the Leased Access Rules Would Harm Existing Programmers and The Viewers They Serve

In the initial comments, many programmers echoed Viacom's concerns that the proposed changes to the leased access rules would undermine the broad distribution and programming quality of existing program services. These commenters demonstrated that the current lack of capacity on many cable systems, coupled with increased usage of leased access, would result in existing program services being "bumped" to make room for leased access programmers.² Indeed, it is significant to note that even proponents of the Commission's proposed rules do not dispute that existing program services will need to be bumped. Rather, they essentially argue that the Commission should ignore the loss of these diverse program offerings with acknowledged marketplace appeal to allow for the theoretical benefits of unproven leased access services.³

² See e.g., Comments of Viacom at 2; Comments of Continental Cablevision, Inc. at 7-9; Comments of C-SPAN and C-SPAN 2 at 7-8; Comments of Outdoor Life Network, et al. at 27-28.

³ See e.g., Comments of Adirondack Television Corporation at 4; Comments of Bruno Goodworth Network, Inc. at 2-3; Comments of Center for Media Education, et al. at 30-31.

As demonstrated in those initial comments, however, carriage disruptions would undermine the economic viability of existing advertiser-supported and premium program services, to the detriment of both programmers and consumers.⁴ Indeed, these programmers demonstrated that the mere threat of being bumped from carriage would affect their ability to enter into or perform long-term agreements with program suppliers and advertisers, as well as inhibit the programmers' ability to raise money in the capital markets.

Viacom also supports those urging the Commission, when deciding whether changes to the rules are necessary, to look to the overall programming marketplace to assess whether the goal of program diversity underlying the program access rules is being achieved. Viacom submits that the record compellingly demonstrates that the programming marketplace is indeed providing diverse sources and types of programming and urges the Commission to conclude that changes to the leased access rules are not needed at this time.

II. To the Extent Changes to the Leased Access Rules are Made, the Commission Should Mitigate the Undisputed Harm to Existing Programmers that Such Changes Could Impose

To the extent the Commission nevertheless determines that changes to the existing leased access rules are needed

⁴ See e.g., Comments of Viacom at 3-7; Comments of C-SPAN and C-SPAN 2 at 7-8; Comments of Lifetime Television at 5-6; Comments of Outdoor Life Network, et al. at 18-22.

at this time, Viacom joins with other programmers in urging the Commission to mitigate the harms to programmers and consumers that will inevitably result from the displacement of existing program services.⁵

First, Viacom supports the grandfathering of carriage of program services carried on a cable system on the effective date of any new rules. This approach will protect programmers -- particularly unaffiliated programmers -- from the dangers of being bumped from carriage. Failure to protect existing programmers will undermine their financial viability as they lose the subscriber base on which their long-term programming, advertising and other commitments are premised. Indeed, as demonstrated in the initial comments, even the threat of being bumped will harm programmers by forcing them to make even greater accommodations to cable operators in order to maintain existing carriage and to obtain launches of new program services.

The Commission should also confirm that a cable operator's need to comply with leased access requirements does not empower it to abrogate existing contracts with programmers. Any such abrogation of existing contracts would only serve to speed the onset of the harm described above.

⁵ See, e.g., Comments of Viacom at 9; Comments of A & E Television Networks, et. al., at 58; Comments of ESPN, Inc. at 6-10.

Finally, at a minimum, the Commission should allow any cable operator that would be forced to remove an existing program service in order to accommodate a leased access programmer to continue to charge the leased access programmer under the existing formula. While the Commission may determine that certain changes to the existing formula should be made, because there has been no demonstration in the record that the existing formula fails to comply with the statutory requirement, phasing in any new formula in this manner⁶ would help to minimize the potential harm to existing programmers while promoting -- rather than hindering -- the diversity goals of the leased access provision.

III. The Record Demonstrates that the Commission Should Not Mandate Carriage of Leased Access Programmers on Any Particular Tier of Service

A number of commenters agreed with Viacom in urging the Commission not to mandate that leased access programmers be placed on the basic or expanded basic tier of services. These comments demonstrated that the placement on such a tier provides the leased access programmer with an unwarranted subsidy -- both by failing to account for the value of tier placement in the proposed formula and by effectively

⁶ As suggested by Viacom in its comments, a transition period that is sufficient to allow for the wide-scale deployment of digital compression technology is best suited to minimize the program disruption to programmers and consumers.

requiring the subscriber, rather than the leased access programmer, to bear the cost of carriage.

These commenters also demonstrate convincingly that mandatory basic or expanded basic tier placement of leased access programmers is nowhere required by the Communications Act and that there are other alternatives that will provide leased access programmers with a "genuine outlet" for their programming.⁷ Indeed, as Viacom noted in its comments, a better solution is to require the leased access programmer to pay for the full cost of the channel (rather than subtracting imputed subscriber fees as the current proposal contemplates).⁸ The leased access programmer would then have the ability to determine how the program service should be offered to the cable system subscribers. This solution places the valuation of the programming where it belongs -- directly between the leased access programmer and the subscriber.

IV. There is No Sound Basis for Precluding Existing Programmers From Moving to Carriage Via Leased Access

The Center for Media Education suggests in its comments that the Commission should preclude existing program services

⁷ See, e.g., Comments of Viacom at 11; Comments of Encore Media Corporation at 5; Comments of Liberty Sports, Inc. at 5-6.

⁸ Comments of Viacom at 11.

from "migrating" to carriage via leased access.⁹ Although, as Viacom demonstrated in its initial comments, such a course is unlikely to occur on a voluntary basis given the fundamental economics of existing program services, there is no sound basis for precluding the migration of existing programmers to leased access, especially for those current programmers who may be "bumped" to make room for a leased access programmer. Indeed, not only would any action by the Commission precluding a particular class of programmer from utilizing leased access raise significant constitutional concerns,¹⁰ but it would effectively deny programmers bumped from carriage (as a result of the leased access rules) from their only means for retaining distribution on the system. Such a blatant attempt to minimize competition for leased access capacity is not worthy of serious consideration and should be rejected out of hand.

V. Conclusion

For the reasons set forth above, Viacom respectfully urges the Commission to consider carefully the impact that changes to the leased access rules will have on the existing

⁹ Comments of Center for Media Education, et al., at 15.

¹⁰ This is not to suggest that the leased access structure generally does not raise other serious constitutional concerns. Viacom reserves the right to address specific constitutional issues at a later date.

programming marketplace. The record fully supports Viacom's concerns that the Commission's proposals will result in the widespread deletion of existing program services to the detriment of both programmers and consumers. To the extent that changes are made to the rules, the Commission should take steps to mitigate the harms to existing program services in the manner described above.

Respectfully submitted,

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May 31, 1996